JUN 11 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1939
No. 142

A. J. DELANEY,

Petitioner,

vs.

NAT ROGAN, Collector of Internal Revenue for the Sixth Collection District of California.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

JOSEPH D. BRADY,
EDGAR LEWIS,
FREDERICK E. HINES,
509 Rowan Building, Los Angeles,
Attorneys for Petitioner.

Parker & Baird Company, Law Printers, Los Angeles.

SUBJECT INDEX.

	PAGE
Opinions Below	1
Question Presented	2
Statutes and Regulations Involved	2
Statement	3
Specifications of Errors To Be Urged	5
Reasons for Granting the Writ	6
The Trial Court's Opinion	6
The Trial Court's Findings	8
The Trial Court's Conclusion	9
The Testimony	9
Conclusion	15

TABLE OF AUTHORITIES CITED.

CASES. PAGE

Helvering v. Rankin, 295 U. S. 123 6

Stewart v. Stewart, 204 Cal. 546, 269 Pac. 439 3

CODE SECTIONS.

California Civil Code, Sec. 161a (added by Stats. 1927, c. 265, p. 484, effective July 29, 1927) 3

Judicial Code, Sec. 240(a), as amended by Act of February 13, 1925 2

RULES OF COURT.

Federal Rules of Civil Procedure, Rule 52(a) 2

Rules of Civil Procedure for District Courts of the United States, Sec. 52(a) 5, 6

IN THE

Supreme Court of the United States

October Term, 1939

No. .....

A. J. DELANEY,

Petitioner,

vs.

NAT ROGAN, Collector of Internal Revenue for the Sixth Collection District of California.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

The petitioner, A. J. Delaney, an individual, by his attorneys, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, entered in the above entitled cause on March 14, 1940, reversing the decision of the District Court of the United States for the Southern District of California, Central Division.

Opinions Below

The opinion of the District Court [R. 25-31] is unreported. The opinion, concurring opinion, and dissenting opinion [R. 282-308] of the Circuit Court of Appeals are reported in 110 F. (2d) 336. The judgment of the

Circuit Court of Appeals was entered on March 14, 1940. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Question Presented.

Whether, in view of Rule 52(a) of the Federal Rules of Civil Procedure, a majority of a Circuit Court of Appeals may substitute their own findings of fact for those of the District Court, where such findings are supported by substantial evidence and, as stated by the trial court and the dissenting judge, are based in large part upon the trial court's belief in the credibility of petitioner's witnesses, in turn based upon careful observation of such witnesses while on the witness stand.

Statutes and Regulations Involved.

Federal Rules of Civil Procedure:

Rule 52. Findings by the Court.

(a) EFFECT. In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; * * * Findings of fact shall not be set aside unless clearly erroneous, *and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.* * * *

Italics supplied throughout.

Statement.

Sec. 161a of the California Civil Code (added by Stats. 1927, c. 265, p. 484, effective July 29, 1927) provides: "The respective interests of the husband and wife in community property * * * are present, existing and equal interests * * *" Sec. 161a does not apply to "old" community property, *i. e.,* property acquired before July 29, 1927, *Stewart v. Stewart,* 204 Cal. 546, 269 Pac. 439.

Although there was involved below the issue as to the status, as "old" or "new" community property under the laws of the State of California, of 1500 shares of stock of Delaney Producing and Refining Company, relief is prayed from this Court only with respect to the issue as to whether 1100 shares of stock of Delaney Petroleum Corporation (hereinafter for convenience termed Petroleum) were "old" or "new" community property under the laws of the State of California. This issue was divided into two fact-parts, (a) were the shares of Petroleum acquired by the petitioner and his wife after July 29, 1927 (the effective statutory date), and (b) were the shares of Petroleum paid for with community funds acquired after July 29, 1927. Two judges of the appellate court agreed with the trial court as to the second question, and so it has been eliminated. Only one of such judges agreed with the trial court as to the first question. Although it is difficult to understand how any finding can be said to be *clearly erroneous* where the deliberations of four learned men upon the question have ended in a "draw" (two for and two against), nevertheless the petitioner, with complete humility, believes that this Court will readily appreciate that the trial court's finding that

the shares of Petroleum were acquired after July 29, 1927 is not *clearly erroneous,* and that this Court is ever willing to enforce its Federal Rules of Civil Procedure.

The facts may be summarized as follows [R. 42-57]:

The petitioner and Golda Delaney intermarried March 23, 1907 and ever since that date have continuously lived together as husband and wife and as residents of the State of California.

Petitioner and his wife, in their separate income tax returns for the calendar year 1930, each reported one-half of the dividends received on 1100 shares of Petroleum on the ground that said shares were "new" community property under the laws of the State of California.

The Commissioner of Internal Revenue, in determining the tax liability of the petitioner and his wife, included all of the dividends received on the aforesaid 1100 shares of Petroleum in the petitioner's net income on the ground that said shares were "old" community property under the laws of the State of California, and asserted a deficiency of $4,968.07* (in part attributable to dividends on shares of Delaney Producing and Refining Company not here in issue) in respect of petitioner's tax for the calendar year 1930. The aforesaid deficiency, with interest in the sum of $1,265.70, was assessed against petitioner and paid by him under protest. The petitioner filed a claim for refund which was disallowed. The petitioner then brought this action against respondent, Nat Rogan, Collector of Internal Revenue, to recover the total sum of

---

*The additional tax of petitioner was determined by the Commissioner to be $10,353.15 [R. 18], but the resulting overpayment determined in favor of petitioner's wife was deducted therefrom, making a net deficiency of $4,968.07.

$6,233.77. A jury trial was waived, the case was tried, and the District Court, having made and filed its findings of fact and conclusions of law, entered judgment in petitioner's favor for the full amount claimed. Respondent appealed to the United States Circuit Court of Appeals for the Ninth Circuit, and that court on March 14, 1940 entered its opinion (one concurring opinion and one dissenting opinion) and judgment reversing the judgment of the District Court.

Specification of Errors to Be Urged.

The Circuit Court of Appeals erred:

1. In setting aside the findings of fact of the District Court contrary to the provisions of section 52(a) of the Rules of Civil Procedure for the District Courts of the United States.

2. In substituting its own findings of fact for those of the District Court although there was substantial evidence in support of the findings of the District Court.

3. In failing and refusing to give due regard to the opportunity of the trial court to judge of the credibility of the witnesses.

4. In failing and refusing to give due regard to the opinion of the trial court, stating that the findings were particularly based upon the fact that petitioner's witnesses were credible as shown by the attitude of such witnesses, their apparent sincerity and their general manner of answering the questions.

5. In failing to affirm the judgment of the District Court.

Reasons for Granting the Writ.

The reasons for granting this writ are necessarily the same as those which induced the adoption of Rule 52(a) Federal Rules of Civil Procedure. Litigants and counsel are entitled to know that Rule 52(a) will be enforced. Counsel, otherwise, would be justified, if indeed not obligated, to appeal all fact cases, determined adversely by the trial court, whenever it was felt that reasonable men might disagree as to the conclusions to be drawn from the evidence. The work of the appellate courts would bog down. This Court would become overburdened by petitions. There is but one remedy—occasional enforcement of Rule 52(a) by this Court, even if it is necessary to reverse a Circuit Court of Appeals, as in *Helvering v. Rankin,* 295 U. S. 123.

It is earnestly believed that the following excerpts from the record prove this to be a proper case for the enforcement by this Court of Rule 52(a).

The Trial Court's Opinion.

> "This case turns largely on questions of fact, and the Court is of the opinion that a prolonged discussion of legal principles will be unnecessary except in so far as required to make clear the grounds upon which the decision rests.
>
> "Considerable time has been devoted in the briefs on both sides to a discussion of the credibility of the witnesses. During the course of the trial, the Court followed the testimony with very careful attention, giving particular note to the attitude of the witnesses

on the stand, their apparent sincerity and their general manner of answering questions, and so forth. The Court is of the opinion that plaintiff's witnesses told the truth and that the testimony they presented constituted the true version of what actually happened. This finding of the Court extends to all of the testimony covering all of the issues in the case. The simple forthrightness of the witnesses, and the inherent plausibility of their version of the facts, contributed to the Court's finding in this regard." [R. 25-26.]

"The agreement between the directors was, in essence, a conditional sale to the plaintiff contingent upon the success of the venture. It is clear to the Court that the intent of the parties was that the whole transaction was to be kept open until the successful accomplishment of their venture. The receipts, referring to payment from salary to be received from the corporation, at a time when no salary was being paid, clearly reinforce this conclusion." [R. 26-27.]

"Furthermore, the transaction was not closed until the bonus was finally voted to Mr. Delaney after the success of the venture had been established, both of which events occurred after the passage of Section 161a." [R. 27.]

"The stock purchased with these funds therefore constituted community property in which the wife had a present, existing and equal interest (1) because Mr. Delaney purchased it in reality after July 29, 1927; * * *" [R. 28-29.]

The Trial Court's Findings.

"X.

"Plaintiff, on or about February 9, 1927, signed a written subscription for a net total of 1224 shares of Delaney Petroleum Corporation stock wherein and whereby he agreed to pay therefor $100 per share in cash 'as called for by the directors of said Corporation.' The corporation received payment for said 1224 shares in the following sums and at the following times:

December 31, 1926	$ 5,000.00
January 5, 1927	5,000.00
February 10, 1927	6,400.00
March 21, 1927	23,600.00
June 21, 1927	27,466.67
June 21, 1927	27,466.66
June 21, 1927	27,466.66
June 21, 1927	.01
Total	$122,400.00

"The first two payments of $5000 each were originally advanced by plaintiff to the corporation to be later credited on stock subscriptions. The remaining payments of $112,400 were made [38] from funds advanced by Messrs. Weatherwax, Hunt and Kaime, pursuant to an oral agreement that plaintiff would become owner of said 1124 shares when and if he paid to Messrs. Weatherwax, Hunt and Kaime the amounts so advanced, and pursuant to a written agreement that plaintiff was obligated to pay such advances only out of any salary he might receive from Delaney Petroleum Corporation. Said shares were, on June 21, 1927, made out in plaintiff's name but subject to said agreements." [R. 52-53.]

"XII.

"With the proceeds of this bonus, the plaintiff, on September 14, 1927, paid Messrs. Weatherwax, Hunt and Kaime the amounts paid by them on account of his subscription to the stock of Delaney Petroleum Corporation, amounting to $112,400, and thereupon the said 1124 shares of stock became the community property of himself and wife. Said 1124 shares of stock in Delaney Petroleum Corporation were acquired by plaintiff and his wife on September 14, 1927, and were paid for with community funds acquired [39] after July 29, 1927." [R. 54.]

The Trial Court's Conclusion.

"III.

"The 1100 shares of Delaney Petroleum Company stock with respect to which dividends of $126,500 were paid in the taxable year 1930 were community property in which plaintiff's wife had a present and existing interest equal to that of plaintiff, and the Commissioner of Internal Revenue erred in taxing more than one-half of the amount of said dividends to plaintiff." [R. 58.]

The Testimony.

"The witness, A. J. Delaney.

Q. Mr. Delaney, what gentlemen were associated with you in the incorporation of the Delaney Petroleum Corporation?

A. C. M. Weatherwax and H. C. Hunt and Alvah M. Kaime.

* * * * * * * *

Q. At the time the corporation was formed what were to be the respective interests of yourself and these four—these three other gentlemen?

A. 50-50 all around, four ways.

* * * * * * * *

Q. I show you Paragraph 4 of the Stipulation of Facts, stating that you subscribed to certain shares of the Delaney Petroleum Corporation, showing the dates and amounts received by the Corporation on your subscription. At the time you made this subscription, did you expect that you would put up, yourself, the amount of cash called for by the subscription; that is, one-quarter of the $122,400.00?

A. No." [R. 130-131.]

"Q. I also show you Exhibits C through H, attached to the Stipulation. These purport to be receipts signed by you, or your secretary, to these other gentlemen you have mentioned, Messrs. Weatherwax, Hunt and Kaime. Can you tell us just what was the occasion for these receipts?

A. Well, that is a record of the money I received from the boys.

Q. That is, these gentlemen advanced to you that amount, those amounts of money?

A. Right.

Q. What did you do with that money? [121]

A. Developed property for the Delaney Petroleum Corporation, put it in business. [122]" [R. 134.]

"Q. Did you speak to these gentlemen about these advances as evidenced by the receipts, before the formation of the corporation?

A. Well, it was at the time we made the bargain, yes." [R. 135.]

"Q. At the time this capital of $500,000 was proposed for the incorporation, did Mr. Weatherwax or any of these three gentlemen say anything about your paying for any portion of stock?

A. I told you a while ago that they put up and if I didn't win I didn't pay. That is all very plain. Now, I don't know how any more fully I could explain it than that. I am not—they put this money up against my twenty-five or twenty-seven years of experience, which they didn't know anything about, and it was up to me to win. When I win and pay off I get a salary, that was it. That is all there was to it and that is all I know." [R. 140.]

"Q. Exhibit L in the stipulation of facts shows what has been taken from the records of the Delaney Petroleum Corporation with regard to the issue and transfer of stock in that [136] corporation. This exhibit shows that certificate No. 2 was issued to you on January 7, 1927, for one share.

A. I think that's right.

Q. It likewise shows on June 21, 1927, there were issued to you a number of certificates.

A. What is there is okay. That is right. Whatever is there is right.

Q. Now, when this stock was issued on June 21, can you tell us what happened to the stock certificates at that time?

A. I think they will show it right in the books.

Q. In your name?

A. Right in the stock books.

Q. They were not at that time torn out of the book?

A. No.

Q. Do you recall when those certificates were taken out of the book, if you know?

A. They were taken out when I paid for them. Whenever that was.

Q. I believe September 14 is the exact date.

A. That must be it.

Q. When you paid for them?

A. That is right." [R. 141-142.]

"Q. Prior to that time had you had conversation with these three gentlemen relating to the ownership of this stock?

A. Yes.

Q. Could you tell where you had the conversation?

A. We did right out in my yard, under the oak tree, when they formed the company and agreed what to do." [R. 167.]

"The Witness: Well, I can't tell you which one was doing the talking, you know, because the four of us were there and probably Mr. Weatherwax did most of the talking. He usually went ahead. We agreed to what they would put up.

The Court: He said they would—

The Witness (Interrupting): He said they would put up [169] the full amount of $500,000 and when —if and when the company was a success, in which I had to do the work,—I had been in the business some twenty-six years before, and so they told me to go ahead and manage the Delaney Petroleum Corporation and as soon as we got it on a paying basis,

why, then I could go ahead and pay for my stock out of the salary which they were going to vote me later. When I did that, why, some of the stock was mine. That is all I can say." [R. 169-170.]

"Q. And your agreement was with them that if you didn't win in this new deal you wouldn't have to pay anything?

A. That is right.

Q. And all you really obligated yourself to furnish was your experience and service?

A. Correct.

Q. You testified also on direct examination regarding these certificates of stock that were issued in your name in the spring of 1927. You said, I think, that these certificates [177] were left in the books. What makes you think that?

A. Well, I am sure they are." [R. 175-176.]

"Q. And you are sure that these certificates were not taken out of the certificate book until about the time you received a bonus?

A. I am sure of that.

* * * * * * * *

The Court: Where was this book in the meantime?

The Witness: That was in the Delaney Petroleum office.

The Court: In the office? [180]

The Witness: Yes.

The Court: In your own office?

The Witness: Yes.

The Court: As president of the company?

The Witness: That is right." [R. 178.]

"The Witness, J. R. Covington.

Q. At the time the Corporation was organized in the Fall of 1926, you have already stated, Mr. Covington, that you were present at this conversation.

Who was present, who else was present at this conversation in the Fall of 1926?

A. Mr. Delaney and Mr. Weatherwax, and Mr. Hunt, and Mr. Kaime and myself.

Q. I believe you also stated that some of these conversations took place at the office of the Company, and some at Mr. Delaney's residence, is that correct?

A. That is true.

Q. At that time what did Mr. Weatherwax, or Mr. Hunt, or Mr. Kaime say, in substance, regarding Mr. Delaney's interest in the Company, if they said anything, in regard to that subject?

A. Well, in substance, they said that they would furnish the money. Mr. Delaney was to furnish the experience, and if the Corporation made money, his salary would take care [260] of his stock." [R. 227.]

"Q. The stipulation has stated that the stock ledger and stock book of the Delaney Petroleum Corporation shows the issue of certain stock by June 21, 1927, to Mr. Delaney. [261]

At the time, who was in custody of this stock book and stock ledger?

A. I was.

Q. When these stock certificates and stubs in the stock book were made out and dated June 21, 1927, do you recall that the stock in which Mr. Delaney was named, if the stock certificates were actually placed in his *position* at that time?

A. They were not. They were in my possession at all times, even after he received them they weren't in his possession." [R. 228.]

"Q. The Stipulation of Facts states that the bonus of $125,000.00 was paid to Mr. Delaney on September 14, 1927.

Do you recall whether these stock certificates were delivered to Mr. Delaney before or after that date?

A. After that date.

The Court: In the meantime, they remained attached to the stubs in the book?

The Witness: They were in the book in my possession." [R. 229.]

Conclusion.

In view of the foregoing corroborated testimony and the fact that four judges were evenly divided on the question, it should not be said that the trial court's finding that the Petroleum shares were acquired after July 29, 1927, was *clearly erroneous.*

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

JOSEPH D. BRADY,
EDGAR LEWIS,
FREDERICK E. HINES,
Attorneys for Petitioner.

May, 1940.

Due service of the within Petition is hereby acknowledged this.....day of June, A. D. 1940.

_____

_____

Attorneys for Respondent.

6-1-40—60